PERSONAL AND CONFIDENTIAL

WRG 001351

PLAINTIFF'S EXHIBIT WRG 188

TO: W. L. Taggart

DATE: December 5, 1967

FROM: C. F. Dugan

SUBJECT: Report of Trip to Kalispell, Montana

CC: R. W. Sterrett
Peter Kostic
J. P. Cabalane

This is a report on my trip to Montana in connection with a hearing before the Montana Industrial Accident Board on a claim by a former employee, L. P. Welsh.

The defendants in the proceedings, Zonolite Division of W. R. Grace & Co. and Maryland Casualty Company, were represented by G. Y. Larrick, Smith Block, Kalispell, Montana who was retained by Maryland Casualty. The hearing was held in Kalispell on November 29 before Robert F. Svanberg, Chairman of the Industrial Accident Board.

On November 28 after arriving at Libby I went up to the operations with Mr. Bleich and Mr. Lovick to observe the operations where Mr. Welsh had been employed. That night Bleich, Lovick, Kujava and I went down to Kalispell where we met with Larrick to discuss the case. The hearing was conducted on the 29th and concluded except for submission by us to the Board of all chest X rays of Mr. Welsh taken since institution of the regular X ray program.

The first purpose of my trip was to observe the caliber of representation being furnished by the counsel retained by Maryland Casualty. I found Mr. Larrick to be a very able and aggressive trial lawyer who was concerned with protection of Grace as much as representing Maryland Casualty. The first point raised by him in our discussion Tuesday night was what he called the "big picture" or possible total exposure of Grace. He pointed out that probably our only defense in the particular case was a technical one; namely, that the disease was contracted before enactment of the Montana Industrial Disease Act and well before addition of the disease of asbestosis as an industrial disease. If we were to win on this technical point it seemed likely to him that the claimant could then bring a common law action with a recovery that could well exceed recovery under the Act. Maximum award under the Act for one disabled by an industrial disease is $60.00 per week for 600 weeks. In a recent Montana case an employee was held not to have been covered by the Act in connection

with inhaling of cement dust and he then recovered approximately $50,000 in a common law action. Since our last annual series of X rays of employees showed approximately 37 employees (about 1 in 4) as having lung conditions which might be the start of asbestosis, the extent of our exposure under the Act could run as much as $1,150,000, and at common law could be as much as $1,600,000. We concluded, however, that our only course was to handle each case on its merits, trying to limit our liability as much as we could in each case as it came along and that we would defend the Welsh case on the only technical ground available to us.

At the hearing claimant's counsel called (i) the claimant, (ii) an employee named Smerken who had been employed for one year, (iii) Arthur Bundrock, the secretary of the local labor union, (iv) Ray Kujawa, our chief engineer, and (v) Mr. Bleich, our manager. It was brought out that Mr. Welsh came to work for Zonolite in 1949 after previous employment as a logger, butcher and trainman. He worked for Zonolite until November 1966 when he was retired because of his disability. (Mr. Welsh is now 64 years old.) During his employment with Zonolite he worked for 37 days in the mill and then drove a truck for many years, primarily carrying ore concentrate down the mountain to the railroad siding. About 1956 he started to work in the warehouse where he remained employed until his retirement. It was brought out, however, that in his employment in the warehouse he did from time to time go to other places in the operation, including the mill.

Much testimony was given as to the quantities of dust caused by the operation. The worst concentrations were admittedly in the mill and in the truck bed when the ore was loaded. Mr. Kujawa's testimony, however, showed that visible dust is not harmful and that only particles under 10 microns in size are hazardous to health.

It was brought out in testimony of the employees that a dust committee was formed about five years ago and that the committee dealt with management and the State Board of Health regarding dust conditions at the operation.

Mr. Welsh's condition was first diagnosed as silicosis when he first consulted doctors about 1959. It seems that asbestosis cannot be definitely established unless a biopsy is done on lung tissue. Mr. Welsh submitted to an operation last June for the purposes of obtaining the tissue for the biopsy which definitely established asbestosis and that was acknowledged on the record. It seems clear, therefore, that he has contracted totally disabling asbestosis and that his only exposure to asbestiform mineral was during his Zonolite employment.

Mr. Kujuva told of tests made at various locations in the operation and at various times to determine dust content. He indicated that United States Public Health standards have established a maximum of 20,000,000 parts of dust per cubic foot of air. His studies indicated that the asbestiform content of the dust at Libby was in the range of 12% indicating an asbentiform content of 2-3,000,000 parts per cubic foot. He stated that United States Public Health standards set a threshold limit of 5,000,000 parts per cubic foot before asbestiform material in the atmosphere is hazardous to the health of a normal person. His studies showed that the equipment for obtaining a dust count could not get a measurable count in the mill complex area outside the mill itself.

There appeared to have been reports from the State Board of Health respecting continuing studies of the situation in one of which it was stated that the asbestiform content ran as high as 40% although this statement was unsupported by any evidence of scientific test. At any rate reports of the State Board of Health are inadmissible by statute in any legal proceedings and, therefore, could not be admitted in this hearing.

The purpose of calling Kleich was to attempt to establish an admission against interest made by Kleich to the dust committee regarding the asbestiform content but this attempt was not successful.

During the afternoon coffee break Mr. Svanberg, Chairman of the Board, joined us and questioned whether some settlement could be made. Apparently he wanted to be taken off the hook in what is a new and most difficult field. Mr. Larrick told him that certainly Mr. Welsh had asbestosis and that probably it was contracted at Zonolite but that it was before the enactment of the Act and Svanberg agreed that the Act could not be applied retroactively. Mr. Larrick said he would consider settlement but that the man who could make any decision along this line was travelling and not available (reference to the fact that you were enroute to Atlanta).

To summarize, I think the record is clear that Welsh contracted asbestosis from his employment with us but the Board may agree that he was not covered at the time the disease was contracted.

The implications of the case are apparent. A record has now been made that there is danger of asbestosis in our operation. It shows efforts to improve the picture such as mandatory use of respirators in critical areas, periodic X ray checkups, independent scientific tests of dust conditions and installation of dust exhaust system. Unfortunately, however, we know that there is a potentially large group of employees who may already have the beginnings of the

disease so that eventual liability cannot be readily forecast. Undoubtedly we will be required to take further and more expensive measures for limiting the exposure. It is also true that as more is learned about the disease the standards may be tightened considerably.

One point that has not been mentioned in any of the discussions so far is the possibility of liability to the general public, although this is probably a very minor exposure. However, it was brought out in the testimony by one of the employees that Zonolite had permitted employees to cut Christmas trees on the property but that after a couple of years this was discontinued; the witness stated that the reason for the discontinuance was that the purchaser of the trees refused to take any more because they were so covered with dust.

Also unmentioned in these discussions was any question of moral obligation apart from legal liability.

Bob Sterrett will consult with J-M as to methods and costs of protection against asbestosis in an asbestos operation such as J-M conducts. He will also check with Stevart and Skardon regarding the mineral content in the South Carolina operation, although he is almost certain that asbestos does not occur there. I have also asked Peter Kostic to look into the problem.

C. F. Dugan

CFD/NS